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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 470

RACHEL MAYER, ISAAC H. MAYER, AND CARL MEYER,
AS TRUSTEES UNDER THE LAST WILL AND TESTA-
MENT OF LEVY MAYER, DECEASED, PETITIONERS

v.

MABEL G. REINCKE, AS COLLECTOR OF INTERNAL
REVENUE IN AND FOR THE FIRST INTERNAL
REVENUE DISTRICT OF ILLINOIS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 349-354) is reported at 130 F. 2d 350. The opinion of the District Court on demurrer (R. 67-80), which was adopted as a part of the court's decision on the merits (R. 325), is reported at 28 F. Supp. 334.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 23, 1942 (R. 355). A petition

for rehearing was denied July 24, 1942 (R. 356). The petition for a writ of certiorari was filed on October 21, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a widow's statutory share in the personal property of her deceased husband is subject under Illinois law to the expenses of administration of his estate and thereby becomes includable in the decedent's gross estate under Section 402 (a) of the Revenue Act of 1921.
2. Whether a widow's dower interest in real property in Illinois is includable in the decedent's gross estate under Section 402 (b) of the Revenue Act of 1921 and, if interpreted to include the dower interest, whether the statute is constitutional.

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *.

* * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

* * * * *

Illinois Revised Statutes (Cahill, 1921):

Chapter 41—Dower.

* * * * *

PAR. 10. PROVISION IN WILL BARS DOWER—ELECTION—RENUNCIATION. Section 10. Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts.

STATEMENT

The decedent, Levy Mayer, died testate on August 14, 1922, a resident of Chicago, Illinois (R. 88-89, 320). At his death he left a considerable estate of personal property and certain Illinois real property acquired by him prior to 1910 and during coverture (R. 94, 322). He was survived by his wife and two daughters (R. 89, 320). In his will he devised and bequeathed the residue of his estate in trust, one-half to his wife for life and the balance to his two daughters (R. 4-10, 89). His will further provided that the trustees in their discretion might use any part of the principal of the wife's share for her needs and requirements should the income prove insufficient (R. 7).

Under existing Illinois law the widow was entitled to renounce the testamentary provisions made for her benefit and to take "dower in the lands" and "one-third of the personal estate after the payment of all debts." Illinois Revised Statutes (Cahill, 1921), c. 41, Par. 10. She failed to renounce under the will, however, and in December of 1925 the executors of the estate, having accounted for all of the property of the estate and distributed a portion in accordance with the will, delivered the balance of the estate on hand to the trustees named in the will (R. 89, 320-321).

An estate tax return for the decedent's estate had previously been filed on August 13, 1923,

and the estate tax as finally determined by the Commissioner of Internal Revenue had been duly paid on August 13, 1923, and December 8, 1924 (R. 90, 321). On August 4, 1927, the trustees filed a claim for refund of estate taxes, which claim forms the basis for the present action (R. 91, 103-109). The claim was rejected by the Commissioner (R. 91, 322) and this action was instituted.

On demurrer to the declaration by the Government, the District Court held (1) that the taxable status of the decedent's property must be determined as of the time of his death, unaffected by any action on the part of the widow in electing to take under the will; (2) that the widow's one-third statutory interest in the decedent's personal property was not subject to the payment of administration expenses and for that reason did not come within Section 402 (a) of the Revenue Act of 1921; and (3) that the widow took her dower interest by operation of law and not by transfer or succession, and that therefore this interest was not includable in the decedent's gross estate under Section 402 (b) of the 1921 Act (R. 67-80). After a trial of the case on the merits the District Court rendered its decision in favor of the petitioners and adopted as a part of its decision its opinion on demurrer (R. 320-325).

The Circuit Court of Appeals reversed the decision of the District Court (R. 355). In so ruling it held that the widow's statutory share in

personalty was subject to the payment of expenses of administration and therefore includable in the decedent's gross estate under Section 402 (a), that the widow's dower interest was includable in the decedent's gross estate under Section 402 (b), and that no constitutional right was thereby invaded (R. 351-354).

ARGUMENT

Section 402 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, as interpreted by this Court in *Crooks v. Harrelson*, 282 U. S. 55, requires the inclusion in the decedent's gross estate of all property "to the extent of the interest therein of the decedent at the time of his death" which is subject (1) "to the payment of the charges against his estate" and (2) "the expenses of its administration." Under Section 10 of the Illinois Dower Act of 1874 the widow is entitled to renounce under her husband's will and to take her dower in realty and "one-third of the personal estate after the payment of all debts." Illinois Revised Statutes (Cahill, 1921), c. 41, Paragraph 10. The widow here failed to renounce the testamentary provisions made for her benefit and took under the decedent's will. The interest which in fact she received was thus subject to both the charges against the decedent's estate and the expenses of its administration. Accordingly, we contended in the court below that inclusion of the value of the widow's interests in the de-

cedent's gross estate should be determined by what actually transpired, from which it necessarily followed that both the personality and real estate were taxable.¹ In the alternative, we argued that both interests were taxable because under Illinois law the widow's statutory share in personality was subject to the payment of administration expenses as well as debts of the decedent, and the widow's dower interest was expressly made includible in the decedent's gross estate under Section 402 (b). Although rejecting the first contention,² the Circuit Court of Appeals reversed the decision of the District Court for the reasons advanced in the alternative. The petitioners seek review of this determination, asserting that a conflict of decisions exists and

¹ *Continental Illinois Bank & Trust Co. v. United States*, 65 F. 2d 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663; *In re Marble's Estate*, 64 F. 2d 745 (C. C. A. 7th).

² One of the reasons assigned by the petitioners for granting the writ (Pet. 10) is the existence of a conflict between the decision below and that in *Helburn v. Ballard*, 85 F. 2d 613 (C. C. A. 6th), affirming 9 F. Supp. 812 (W. D. Ky.). The *Ballard* decision, however, rests upon the acceptance of the Government's first contention described above. In determining the content of a decedent's gross estate the court there took into consideration facts occurring after the decedent's death, i. e., the widow's election to take under the will. In this case the court rejected that contention. On this point, we do not seek review, and since the court below adopted the petitioner's argument, they too do not seek review on this point. However, if certiorari should be granted we may wish to contend in the alternative that the result below may be sustained upon this ground.

that the interpretation of Section 402 (b) renders it unconstitutional.

1. The inclusion in the decedent's gross estate of the value of the widow's interest in the decedent's personality turns upon whether this interest is subject to the payment of expenses of administration under Illinois law. The Illinois Dower Act of 1874 provides that, if the widow so elects, she shall be entitled to "one-third of the personal estate after the payment of all debts":³ Illinois Revised Statutes (Cahill, 1921), c. 41, Paragraph 10. As the court below stated, the question appears never to have been squarely litigated in Illinois. Without exception, however, in a line of considered dicta and holdings *sub silentio* the Illinois courts have stated and held that the widow's statutory share in personality is subject to all debts of the estate, including the costs of administration as well as obligations created by the decedent.⁴ See *Laurence v. Balch*, 195 Ill. 626, 627, 630; *Zakroczymski v. Zakroczymski*, 303 Ill. 264, affirming 222 Ill. App. 299, 301; *In re Taylor's Will*, 55 Ill. 252, 259; *Saunders v. Saunders*, 310 Ill. 371, 372.

³ The statutory phrase "all debts" is in itself inclusive of obligations created by the executor, since these as well as obligations created by the decedent are "debts."

⁴ In conformity with the opinions of the Illinois courts, it is the uniform administrative practice in the probate court of Cook County to deduct debts and expenses of administration before computing the value of the widow's interest (R. 258-268).

The legislative history of Section 10 of the Illinois Dower Act of 1874 removes any possible doubt as to the correctness of the decision below. The provision for a widow's share in personality first appeared in express form in Section 40 of the Wills Act of 1829 as one-third of the personal estate "after the payment of all just debts and claims against the estate of such testator." Illinois Revised Laws (1829), pp. 204-205. It thereafter appeared in varying form with the phrases "debts and claims," "debts" or "claims," or without any similar qualifying phrase. Illinois Revised Statutes (1845), c. 34, Section 10; Laws of Illinois (1872), pp. 77, 97, 352, 353; Illinois Revised Statutes (Hurd, 1874), c. 41, Section 10; Illinois Revised Statutes (Cahill, 1927), c. 41, Paragraphs 1, 10, 12; Laws of Illinois (1939), p. 13. There is no ground for believing that in the adoption of the provision in varying form the size of the widow's share was being whimsically fluctuated by the Illinois legislature. On the contrary, it was simply reenacting the substance of the provision as it first appeared in the Wills Act of 1829. The courts of Illinois have repeatedly so held. *McMurphy v. Boyles*, 49 Ill. 110; *In re Taylor's Will*, *supra*; *Zakroczymski v. Zakroczymski*, *supra*; *In re Estate of Judd*, 292 Ill. App. 563 (1st Dist.).

None of the Illinois decisions which the petitioners cite as conflicting with the decision below in any manner involved Section 10 of the Illinois

Dower Act of 1874. These cases contain statements that in certain other situations a distinction is to be drawn between debts created by the decedent and obligations created by the executor. The petitioners' entire argument is that from these statements it must necessarily follow that the word "debts" in Section 10 of the Dower Act can refer only to debts created by the decedent and not to administration expenses. The *non sequitur* is apparent even in the absence of any expression by the Illinois courts on the meaning of Section 10 of the Dower Act.⁵ And the Illinois cases cited above indicate affirmatively that the widow's statutory share in personalty is subject to the cost of administration as well as the debts of the decedent. The asserted conflict with *Crooks v. Harrelson*, 287 U. S. 55, *supra*, rests on the assumption that the court below erred in finding that the widow's statutory interest was thus subject to both the expenses of administration and claims against the estate. Since under the law of Illinois her interest is subject to both, the coordinate requirements of the *Harrelson* case are met. Moreover, that case involved real property in Missouri.

⁵ The attempt to remove a transfer from the normal incidence of federal taxation by relying upon distinctions drawn by state law requires at least clear and convincing proof that the local law sustains the distinctions urged. Cf. *Helvering v. Leonard*, 310 U. S. 80, 86; *Helvering v. Fitch*, 309 U. S. 149, 156.

The questions thus posed are now of limited significance. They cannot arise with respect to the estates of persons dying after 1926, since the requirement that the decedent's interest be subject to charges and administration expenses was removed from the estate tax law in Section 302 (a) of the Revenue Act of 1926, and has not reappeared.

2. Section 402 (b) of the Revenue Act of 1921 expressly requires the inclusion in the decedent's gross estate of all property "to the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, * * * or by virtue of a statute creating an estate in lieu of dower * * *." Petitioners attempt to take the dower interest here involved out of the statute by urging that the characteristics of "dower" in Illinois differ from the characteristics of "dower" in many other states. However, the committee reports relating to the adoption of Section 402 (b) as it first appeared in the Revenue Act of 1938 clearly disclose the purpose of Congress to make it all-inclusive. H. Rep. No. 767, 65th Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 86, 101). The insubstantial local variations which are urged cannot avert the incidence of federal taxation addressed basically to the interest here involved. Cf. *Morgan v. Commissioner*, 309 U. S. 78. Moreover, from the very cases relied upon by petitioners and which they assert conflict with the decision below, it would

seem that common law characteristics of dower prevail in Illinois. See, *e. g.*, *Sisk v. Smith*, 6 Ill. 503. If subsection (b) is to be given any scope for operation, clearly it must require the inclusion of the value of the widow's dower interest here. See 1 Paul, *Federal Estate and Gift Taxation* (1942), pp. 228-235. See also, *Billings v. People*, 189 Ill. 472, affirmed, 188 U. S. 97.

The petitioners contend that this interpretation as applied to real property acquired by the decedent prior to 1918 renders the statutory provision unconstitutional. Their contention apparently rests on the ground that the wife's interest was acquired on the purchase of the property and that therefore no interest is transferred by the husband's death. In view of the decisions of this Court sustaining the estate tax provisions relating to joint tenancies and tenancies by the entireties, there can be no substantial question at this late date as to the validity of the dower provision. *United States v. Jacobs*, 306 U. S. 363; *Helvering v. Bowers*, 303 U. S. 618; *Griswold v. Helvering*, 290 U. S. 56; *Tylor v. United States*, 281 U. S. 497. The case for the inclusion of the value of a dower interest is even stronger, since before his death the husband has both the full fee and sole possessory interest, while his wife has only an inchoate interest. Clearly substantial incidents of ownership pass on his death. The constitutionality of the dower provision has been uniformly up-

held. *Allen v. Henggeler*, 32 F. 2d 69 (C. C. A. 8th), certiorari denied, 280 U. S. 594; *United States v. Waite*, 33 F. 2d 567 (C. C. A. 8th), certiorari denied, 280 U. S. 608; *Nyberg v. United States*, 66 C. Cis. 153, certiorari denied, 278 U. S. 646.

CONCLUSION

The decision below is correct and there is no conflict. The petition should therefore be denied.

Respectfully submitted.

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